MALAYAN BANKING BHD v. PRABANAH MANOGARAN SULTAN

HIGH COURT MALAYA, PULAU PINANG
WONG HOK CHONG JC
[CIVIL APPEAL NO: PA-12BNCC-3-02-2019]
10 MARCH 2021

EMPLOYMENT LAW: *Employment – Wrongful dismissal – Employee worked as bank teller – Discovery of cash shortage – Employee summarily dismissed – Whether dismissal wrongful – Whether employee caused cash shortage – Damages that could be awarded for wrongful dismissal*

INDUSTRIAL COURT: *Remedies – Wrongful dismissal – Remedies available upon finding of wrongful dismissal – Whether remedies statutory creation available at Industrial Court only – Whether available under common law and at civil courts – Industrial Relations Act 1967, s. 20*

EVIDENCE: *Burden of proof – Civil matter – Employee summarily dismissed from employment – Employee commenced civil suit at Sessions Court for wrongful dismissal at common law – Burden of proof applicable*

EVIDENCE: *Standard of proof – Civil matter – Employee summarily dismissed from employment – Employee commenced civil suit at Sessions Court for wrongful dismissal at common law – Standard of proof applicable*

The respondent worked as a bank teller with the appellant. The respondent was one of the three tellers manning the counters when it was discovered, at the end of one working day, that there was a cash shortage of RM7,000. An internal investigation and domestic inquiry carried out found the respondent to be responsible for the cash shortage as she had deposited the said amount into the account of one Tan without being able to account for it. The respondent was subsequently summarily dismissed by the appellant. The respondent made a representation for unfair dismissal under s. 20 of the Industrial Relations Act 1967 ('IRA') but the same was not referred by the Minister to the Industrial Court. She was also charged for criminal breach of trust but was acquitted ('acquittal'). The respondent later commenced a civil suit against the appellant, at the Sessions Court, for wrongful dismissal at common law. The Sessions Court Judge ('SCJ') held in favour of the respondent and, in arriving at her decision, found that: (i) the appellant failed to call Tan and the other two tellers as witnesses, resulting in gaps in evidence; and (ii) there were doubts that the respondent caused the cash shortage. The SCJ then ordered the appellant to pay the respondent, *inter alia*, salary and employer's EPF contribution for the period of 54 months. Hence, the present appeal on the following points, *inter alia*, (i) the finding that the dismissal was wrongful; and (ii) the damages that could be awarded for wrongful dismissal.

Held (allowing appeal):

(1) The SCJ misdirected herself on the law of evidence and plainly erred in her assessment of the evidence, resulting in her arriving at plainly erroneous findings. The SCJ wrongly placed the burden of proof on the appellant as if it were an Industrial Court trial where the burden was on the employer to justify that the dismissal was fair; which explained why the SCJ found that the gaps in the evidence worked against the appellant. As this was a civil suit brought by the respondent, the burden of proof rested with the respondent to prove that she was wrongfully dismissed. If there were gaps in evidence, then these gaps were in the respondent's case, not the appellant's. The SCJ further erred on the issue of standard of proof when she entertained doubts raised by the respondent. The standard of proof in a civil suit was that of balance of probability; not whether the respondent had raised a doubt. (paras 24-26, 30-31 & 35)

(2) The remedies available in a civil suit for wrongful dismissal must be distinguished from the remedies available to the Industrial Court in a claim for unfair dismissal under s. 20 of the IRA. Under the IRA, the Industrial Court, upon finding a dismissal to be unfair, has the powers to order (i) back wages up to 24 months to be paid to the employee; (ii) the employee be reinstated; or (iii) the employee be compensated *in lieu* of reinstatement, usually at the rate of one month's remuneration for each year of completed service. These remedies in the Industrial Court are statutory creations and have no place at common law and the civil courts. Therefore, the SCJ erred in awarding damages exceeding the respondent's remuneration for one month. (paras 9-12)

Case(s) referred to:

Fung Keong Rubber Manufacturing (M) Sdn Bhd v. Lee Eng Kiat & Ors [1980] 1 LNS 156 FC ***(refd)***

Krishnan Nambiar Perabakaran & Ors v. Dr P Mahendran & Anor [2008] 10 CLJ 215 HC ***(refd)***

Legislation referred to:

Evidence Act 1950, ss. 101, 102, 103, 106, 114(g)
Industrial Relations Act 1967, s. 20

For the appellant - Edwin Rajasooria; M/s Kamil Hashim Raj & Lim
For the respondent - C Shanmugaiah; M/s C Shanmugaiah & Co

[Editor's note: Appeal from Sessions Court; Civil Suit No: B52NCC-11-03-2015 (overruled).]

Reported by Najib Tamby

JUDGMENT

Wong Hok Chong JC:

Introduction

[1] This is the appellant/defendant's appeal against the learned Sessions Court Judge's ("LSCJ") decision to allow the respondent/plaintiff's claim after a full trial. I heard and allowed the appeal and these are the grounds for my decision.

Background

[2] The background facts are as follows. The respondent worked as a bank teller with the appellant bank until she was summarily dismissed on 8 April 2009. The events that led to her dismissal are summarised as follows:

(i) On 24 November 2008, it was discovered at the end of the working day that there was a cash shortage of RM7,000 from the bank counters. There were three tellers manning the counters and the respondent was one of them;

(ii) Internal investigations found the respondent responsible for the cash shortage. She had deposited RM7,000 cash into the account of Tan Le He at 9:31am that morning without being able to account for it;

(iii) the appellant issued a show cause letter charging the respondent for misconduct – serious breach of duty and serious acts of misconduct;

(iv) the domestic inquiry found the respondent responsible for the RM7,000 cash shortage. She knew Tan Ie He ("Tan") and owed him RM7,000. She had credited RM7,000 cash into Tan's account without being able to account for it; and

(v) the appellant summarily dismissed her on 8 April 2009.

IRA And Criminal Proceedings

[3] Following the summary dismissal:

(i) the respondent made a representation for unfair dismissal under s. 20 of the Industrial Relations Act 1967 ("IRA") but it was not referred by the Minister to the Industrial Court; and

(ii) she was charged for criminal breach of trust ("CBT"), but was acquitted on 17 October 2014.

Civil Suit

[4] About five months after the acquittal, the respondent commenced the civil suit in the Sessions Court for wrongful dismissal in common law, from which this appeal emanates. In her claim she prayed for:

(i) special damages for loss of:

(a) salary and employer's EPF contribution from dismissal date (8 April 2009) until the filing of the writ (27 March 2017) – a period of 59 months – totalling RM127,381 and RM20,380.96 respectively; and

(b) salary and employer's EPF contribution from filing of the writ (27 March 2017) until his retirement at age 55 years old – a period of 189 months – totalling RM408,051 and RM65,288.16 respectively;

(ii) general damages; and

(iii) punitive damages of RM60,000.

Sessions Court Judgment

[5] The LSCJ found that the respondent was wrongfully dismissed and ordered the appellant to pay the respondent:

(i) salary and employer's EPF contribution from dismissal date (8 April 2009) until his acquittal of the CBT charge (17 October 2014) – a period of 54 months – totalling RM135,026 (RM2,519 x 54) and RM18,653.76 (RM345.44 x 54) respectively; and

(ii) general damages to be assessed.

Point Of Appeal

[6] The appellant's appeal is based on three main points, that is the LSCJ erred in:

(i) finding that the dismissal was wrongful;

(ii) relying on the decision of the criminal court to acquit; and

(iii) the damages that can be awarded for wrongful dismissal.

Damages For Wrongful Dismissal

[7] If I may be permitted to address the third issue – damages for wrongful dismissal – first, as it pertains to the underlying cause of action and the remedies that flow therefrom.

[8] In a wrongful dismissal suit at common law, the only question before the court is whether the employee was terminated according to the terms of the employment contract. What this means is that:

(i) where there was no serious misconduct, the employee must be given contractual notice of termination or remuneration *in lieu* thereof; and

(ii) where there is a serious misconduct, the employee need not be given contractual notice of termination and may be summarily dismissed without notice, in which case he is not entitled to remuneration *in lieu* of notice.

[9] The relevance of whether the respondent was guilty of a serious misconduct only goes to whether he is entitled to notice of termination and nothing more. In other words, in this case:

(i) if the respondent proves that he was wrongfully dismissed, he is entitled to one month's remuneration as damages; and

(ii) if the respondent is not able to prove that he was wrongfully dismissed, he is not entitled to any compensation.

Wrongful Dismissal (Civil Suit) v Unfair Dismissal (Industrial Court)

[10] The remedies available in a civil suit for wrongful dismissal must be distinguished from the remedies available to the Industrial Court in a claim for unfair dismissal under s. 20 of the IRA.

[11] Under the IRA, where the Industrial Court, upon finding a dismissal to be unfair, has powers to: (i) order back wages up to 24 months to be paid to the employee and (ii) order that the employee be reinstated; or (iii) be compensated *in lieu* of reinstatement, usually at the rate of for one month's remuneration for each year of completed service.

[12] These remedies vested in the Industrial Court are statutory creation and have no place in the common law and the civil courts. This is trite law as explained in the Federal Court's judgment in *Fung Keong Rubber Manufacturing (M) Sdn Bhd v. Lee Eng Kiat & Ors* [1980] 1 LNS 156; [1981] 1 MLJ 238 ("*Fung Keong Rubber*"):

> In the case of a claim for wrongful dismissal, a workman may bring an action for damages at common law. This is the usual remedy for breach of contract, e.g., a summary dismissal where the workman has not committed misconduct. The rewards, however, are rather meagre because in practice the damages are limited to the pay which would have been earned by the workman had the proper period of notice been given. He may even get less than the wages for the period of notice if it can be proved that he could obtain similar job immediately or during the notice period with some other employer. He cannot sue for wounded feelings or loss of reputation caused by a summary dismissal, where for instance he was dismissed on a groundless charge of dishonesty. At common law it is not possible for a wrongfully dismissed workman to obtain an order for reinstatement because the common law knew only one remedy, *viz.*, an award of damages. Further, the courts will not normally "reinstate" a workman who has been wrongfully dismissed by granting a declaration that his dismissal was invalid: see *Vine v. National Dock Labour Board* [1957] AC 488, 500, 507; *Francis v. Municipal Councillors of Kuala Lumpur* [1962] WLR 1411; [1962] MLJ 407. At the most it will declare that it was wrongful.

Excessive Damages

[13] It is thus clear that the LSCJ, upon finding the dismissal to be wrongful, had erred in awarding damages exceeding the respondent's remuneration for one month of RM2,864.44 (2,519 + 345.44). This is assuming that the LSCJ's finding that the dismissal was wrongful was correct.

Criminal Court Acquittal

[14] On the second issue, the LSCJ was only influenced by the acquittal in the criminal court for the purposes of setting an end date for the computation of damages. There was actually no legal basis for her decision. However, in light of my finding above, it is now an academic point.

[15] Apart from that, there was no indication that her decision in this civil suit was influenced by the acquittal.

Was Dismissal Wrongful?

[16] Now that it is clear that the relevance of whether the respondent was guilty of a serious misconduct is only to determine whether the respondent may be summarily dismissed or must be given one months' notice or remuneration *in lieu* thereof; we now turn to the appellant's first point – that is whether the summary dismissal was wrongful or, in other words, was the respondent guilty of a serious misconduct.

Trial

[17] It was common ground that there was shortage of RM7,000 for the day's collection. The issue was whether the respondent was responsible for the said shortage, as found by the domestic inquiry.

[18] At trial, as with the domestic inquiry, there was cogent evidence led by the appellant through the cash officer (SD2) that attributed the cause of the shortage to the respondent. There was only one cash deposit of RM7,000 that day and it was credited by the respondent (SP1) at 9:31am into the account of Tan le He. CCTV records showed that there was no one depositing RM7,000 through the respondent (SP1) at around 9:31am.

[19] At the domestic inquiry, Tan gave evidence that the RM7,000 cash credited into his account was payment for a debt owed by the respondent to him and that he had not asked anyone to pass the money to the respondent to credit to his account. Unfortunately, Tan did not give evidence at the trial.

[20] The irresistible inference from these facts, even without Tan's testimony, is that the impugned transaction was attributed to the respondent crediting RM7,000 into Tan's account at 9:31am that morning. The issue then is where the RM7,000 cash came from: was it from the bank's cash register or from Tan's friend.

[21] It is incumbent on the respondent, as plaintiff and alleger of circumstances known only to her, to prove that she received RM7,000 from Tan's friend outside the bank before she credited the cash into Tan's account at 9:31 am.

[22] To this end, the respondent made the following statement in answer to question 18 of her witness statement and this was the only evidence that the respondent (SP1) gave to support her claim:

(18) Soalan : Defendan menyatakan bahawa awak telah mengkreditkan wang tunai RM1,000.00 ke akaun pelanggan defendan tanpa menerima wang. Adakah ini betul.

Jawapan : Tidak betul. Pada pagi lebih kurang 9.00 pagi pada 24-11-2008 samada saya hendak masuk ke kerja seorang berjumpa saya diluar bank menyatakan kawan pelanggan tersebut dan meminta saya mengkreditkan RM7,000.00 ke akaun pelanggan itu. Saya bersetuju dan menerima RM7,000.00 dan masuk ke bank dan kemudian mengkreditkan wang tersebut ke akaun pelanggan tersebut mengikut prosedur.

[23] At the end, the LSCJ found in favour of the respondent. In coming to her decision, she found as follows:

(i) The appellant had failed to call Tan as a witness at the trial and the court is not obliged to accept the evidence of the domestic enquiry.

(ii) The appellant had failed to call the other two tellers as witnesses at the trial to prove that they were not responsible for the RM7,000 shortage. As a result, there were gaps in the evidence and adverse inference was drawn against the appellant under s. 114(g) of the Evidence Act 1950 ("EA").

(iii) The appellant had failed to call Tan's friend who allegedly passed the RM7,000 to the respondent (SP1) to disprove the possibility that the respondent had received the RM7,000 cash from Tan's friend outside the bank's premises.

(iv) There are doubts that the respondent caused the RM7,000 shortage.

Misdirection And Errors In Assessment On Evidence

[24] The appellant submits that the LSCJ had misdirected herself on the law of evidence and plainly erred in her assessment of the evidence. I agree with the appellant on the following points.

Burden Of Proof

[25] First, the LSCJ had wrongly placed the burden of proof on the appellant as if it were an Industrial Court trial where the burden is on the employer to justify that the dismissal was fair; which explains why the LSCJ found that the "gaps" in the evidence – namely the absence of Tan, the two tellers and Tan's friend as witnesses – worked against the appellant.

[26] As this was a civil suit brought by the respondent as plaintiff, the burden of proof rests with the respondent to prove that she was wrongfully dismissed (ie, she was innocent).

[27] Sections 101 to 103 of the EA provide as follows:

Section 101

(1) Whoever desires any court to give judgment as to any legal right or liability, dependent on the existence of facts which he asserts, must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.

Section 102

The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

Section 103

The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

[28] This is especially so on the critical point of whether the respondent received the RM7,000 cash from Tan's friend outside the bank that morning, as this fact is only known to her and not the appellant.

[29] Section 106 of the EA provides as follows:

Section 106

When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him.

ILLUSTRATIONS

(a) When a person does an act with some intention other than that which the character and circumstances of the act suggest, the burden of proving that intention is upon him.

(b) A is charged with travelling on a railway without a ticket. The burden of proving that he had a ticket is on him.

[30] If there are gaps in the evidence, then these are gaps in the respondent's case, not the appellant's, as it was incumbent on the respondent to call Tan, the two tellers and Tan's friend to prove her innocence.

Adverse Inference

[31] Connected to this is the LSCJ's second error of drawing an adverse inference against the appellant for failing to call the two tellers as witnesses. As the burden of proof rests with the respondent to prove her innocence, if there were to be any adverse inference drawn, it would have been drawn against the respondent.

[32] Further, adverse inference may only be drawn when there is suppression or withholding of evidence. There was no evidence of suppression or withholding of evidence by the appellant whatsoever. In the premise, there is no basis for invoking s. 114(g) of the EA under these circumstances.

[33] This was explained in by High Court's judgment in *Krishnan Nambiar Perabakaran & Ors v. Dr P Mahendran & Anor* [2008] 10 CLJ 215; [2009] 4 MLJ 267:

> [8] In my judgment s. 114(g) of the Act, where relevant, merits reproduction as follows:
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> 114 Court may presume existence of certain fact
>
> The Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct, and public and private business, in their relation to the facts of the particular case.
>
> ILLUSTRATIONS
>
> (g) that evidence which could be and is not produced would if produced be unfavourable to the person who withholds it;
>
> [9] Lest it be misunderstood, I find it necessary to reaffirm the law contained in s. 114(g). I shall enumerate the relevant principles as follows:
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> (1) The single most important word therein is 'withholds';
>
> (2) The adverse inference thereunder is not mandatory but discretionary, having regard to the relevancy and materiality of a particular witness: see *Lau Song Seng & Ors v. Public Prosecutor* [1998] 1 SLR 663 Singapore (CA); and
>
> (3) Withholding or suppression of material evidence is a *sine qua* non; a mere failure or non-production *per se* is insufficient: see eg *Munusamy v. Public Prosecutor* [1987] 1 MLJ 492 at p 494 (SC) per Mohamed Azmi SCJ (as he then was); and *Pekan Nenas Industries Sdn Bhd v. Chang Ching Chuen & Ors* [1998] 1 MLJ 465 (FC) per Edgar Joseph Jr FCJ (as he then was).
>
> [10] In the absence of defendants' withholding or suppression of evidence, no adverse presumption may be drawn against the defendants under s. 114(g) of the Act.

Cash Officer's (SP2) Evidence

[34] Third, the LSCJ failed to take into consideration the cogent evidence of cash officer, Mastura Isyak's (SD2). SD2 had explained the reasons for attributing the missing cash to the respondent. There was only one cash deposit of RM7,000 that day and it was credited by the respondent (SP1) at 9:31am into the account of Tan Ie He. CCTV records showed that there was

no one depositing RM7,000 through the respondent (SP1) at and around 9:31am. With SP2's explanation, there was in fact no need to call the two tellers as witnesses as they would not have added anything to SD2's testimony.

Standard Of Proof

[35] Fourth, the LSCJ not only erred on the issue of burden of proof but also on the issue of the standard of proof as she found in favour of the respondent because she had doubts on whether respondent had taken the RM7,000 from Tan's friend or not. The standard of proof in a civil suit is that of balance of probabilities; not whether the respondent had raised a doubt.

Findings

[36] I find that the LSCJ had misdirected herself on the law of evidence and plainly erred in her assessment of the evidence resulting in her coming to a plainly erroneous finding.

Decision

[37] For the above reasons, I allowed the appeal.